

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ SEP 15 2017 ★

-----X
CARLOS VILLAFANE,

Plaintiff,

LONG ISLAND OFFICE

-against-

ORDER

16-CV-3674 (JFB) (AKT)

MICHAEL SPOSATO and ARMOR
CORRECTIONAL HEALTH SERVICES,

Defendants.
-----X

JOSEPH F. BIANCO, District Judge:

On August 22, 2017, Magistrate Judge A. Kathleen Tomlinson issued a Report and Recommendation (the "R&R," Dkt. No. 53), recommending to the Court that the motion to dismiss filed by defendants Michael Sposato and Armor Correctional Health Services of New York s/h/a Armor Correctional Health Services be granted, in part, and denied, in part. Specifically, the R&R recommends that the motion to dismiss be denied insofar as it seeks dismissal based on *pro se* plaintiff's failure to exhaust his administrative remedies, and that the motion to dismiss otherwise be granted. (R&R 54.) The R&R further recommends that plaintiff's complaint be dismissed, without prejudice, with leave to amend. (*Id.*) The R&R was served on plaintiff on August 23, 2017. (Dkt. No. 54.) The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R. (R&R 54.) The date for filing any objections has thus expired, and plaintiff has not filed any objection to the R&R. For the reasons set forth below, the Court adopts the thorough and well-reasoned R&R in its entirety, grants the motion to dismiss, in part, denies the motion to dismiss, in part, and grants plaintiff thirty (30) days to amend his complaint.

Where there are no objections to a report and recommendation issued by a magistrate judge, the Court may adopt the report and recommendation without *de novo* review. See *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”); see also *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”); cf. 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. See *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (“[B]ecause the waiver rule is non jurisdictional, we ‘may excuse the default in the interests of justice.’” (quoting *Thomas*, 474 U.S. at 155)).

Although plaintiff has waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having conducted a review of the Complaint, the motion papers, and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the findings and recommendations contained in the well-reasoned and thorough R&R in their entirety. Accordingly,

IT IS HEREBY ORDERED that the motion to dismiss (Dkt. No. 19) is denied as to all defendants insofar as it seeks dismissal based on plaintiff’s failure to exhaust his administrative remedies, and that the motion is otherwise granted as to all defendants.

IT IS FURTHER ORDERED that plaintiff shall have thirty (30) days from the date of this Order to file an amended complaint. Plaintiff is warned that failure to file an amended complaint by that time will result in the Court dismissing the action against all defendants with prejudice.

IT IS FURTHER ORDERED that defendants serve a copy of this Order on plaintiff and file proof of service with the Court.

SO ORDERED.


JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: September 15, 2017
Central Islip, NY